

# SBM STATE BAR OF MICHIGAN

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### SYLLABUS

A lawyer may communicate with a caseworker for the Family Independence Agency (FIA) in a case in which the FIA is a petitioner in Family court, notwithstanding an appearance having been filed by an attorney indicating that FIA is represented by counsel.

References: MRPC 4.2; MCL 712A; *In re Hill*, 206 Mich App 689, (1994); *In re Jagers, supra*; *Santovsky v. Kramer*, 455 US 475, 102 S.Ct. 1388, 71 L Ed2d 599 (1982).

### TEXT

A lawyer in the course of representing a parent against whom a petition filed by the Family Independence Agency (FIA) pursuant to the provisions of MCL 712A.2(b) wishes to contact the FIA case worker responsible for the matter involved in the petition and discuss matters involving the basis of and resolution of the petition with that case worker. The lawyer does not have the consent of the Assistant Attorney General who appears on behalf of the petitioner (FIA). The question is whether this conduct would violate the provisions of MRPC 4.2 that states:

"In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

The FIA is an agency of state government charged with, among other matters, the enforcement of the state's Child Protection Law. In so doing FIA caseworkers have the authority and responsibility to seek out and determine facts that either support or refute a claim of child abuse or neglect. The case worker on behalf of FIA must file a petition in the Family Division of the Circuit Court for authorization by the court under MCL 712A.2(b) whenever their investigation discloses certain facts and circumstances outlined in MCL 722.638(1). Actions taken under MCL 712A.2(b) are not criminal proceedings. (MCL 712A.1(2).)

In a criminal proceeding, the prosecuting attorney or Attorney General appears on behalf of the state or county and represents the people, not a specific complainant or client (MCL 49.153). In that example the prosecuting attorney has absolute discretion, in deciding whether or not to initiate a case or when and how to terminate a case short of trial. This decision is made independent of what the complainant (if there is one) desires to happen.

Unlike a criminal proceeding, when a prosecuting attorney or Attorney General appears in the Family Division of the Circuit Court in a child abuse or neglect proceeding, he or she does so in one of three ways; as the petitioner (MCL 712A.19b(1) and *In re Jagers*, 224 Mich App 359 (1997); at the request of the court MCL 712A.17(4); or as the attorney for FIA (MCL 712A.17(5)).

MCL 712A.17(5) provides: "In a proceeding under section 2(b) of this chapter, upon request of the family independence agency . . . the prosecuting attorney shall serve as a legal consultant to the family independence agency or its agent at all stages of the proceeding. If in a proceeding under section 2(b) of this chapter the prosecuting attorney does not appear on behalf of the family independence agency or its agent, the family independence agency may contract with an attorney of its choice for legal representation."

Whenever the FIA is the petitioner or appears in a court proceeding as an interested party and the prosecuting attorney or any other lawyer appears on behalf of FIA in that proceeding pursuant to the provisions of MCL 712A.17(5), FIA is the client of that lawyer with regard to the matters before the court in that case. (See also *In re Hill*, 206 Mich App 689, (1994) and *In re Jagers*, *supra*.) However, that fact alone does not end the inquiry.

MRPC 4.2 prohibits only those direct contacts that are not authorized by law. MCL 712A.17d, for example, requires the attorney for the child to consult with the important parties in the case, and this would include the FIA caseworker. The commentary to MRPC 4.2 addresses a factual situation to be considered here. It states: "Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter."

Cases that are begun by petition pursuant to MCL 722.638 and filed by FIA under MCL 712A.2(b) are filed by an agency of state government. Although some may argue that such a petition does not necessarily equate to "a controversy with a government agency," in a sense it does. If a lawyer is authorized by law to have contact with a government agency in situations where there is a direct controversy with a government agency, then certainly the lawyer would be authorized by law to have such contact in situations where the government agency is only indirectly involved in the controversy.

FIA, as an agency of state government, is charged with the investigation and follow through of matters involving the Child Protection Act. That follow through may or may not involve a petition in the Family Court. If there is no petition filed, the provisions of MCL 712A.17(5) would clearly not apply. A lawyer may assist the parents who were the subject of the FIA investigation without regard of violating MRPC 4.2. In situations in which FIA chooses to file a petition, MCL 712A.17(5) provides a manner in which the agency will have legal counsel at the hearing. It does not change the status of FIA or the controversy.

In order for all parties associated with the case to accomplish the goals of the Child Protection Act, both the guardian *ad litem* and lawyer for the parents must have access to the government agency that is responsible for the investigation and ultimate recommendation to the court relating to any plan the court may impose should jurisdiction be obtained in the case. Such necessities place the factual situation discussed here, at least impliedly, within the exception stated in MRPC 4.2; that it is "authorized by law." As such it is not a violation of MRPC 4.2 for the lawyer representing the parents or the child in child protective proceedings to contact the FIA caseworker without the consent of the lawyer appearing in court for FIA.

MRPC 4.2 presents difficult interpretations in the governmental setting. Therefore, this opinion is offered only on the narrow facts presented in this inquiry. The Committee believes that the Rules of Professional Conduct should be interpreted in a common sense manner and that interpretation of the requirements of MRPC 4.2 must be consistent with the intent and practical application of the child protection statutes.

Child protection proceedings are unique. Although the proceeding is considered a civil proceeding, MCL 712A.1(2), it has many similarities to a criminal case and important constitutional rights are at stake, *Santovsky v. Kramer*, 455 US 475, 102 S Ct 1388, 71 L Ed 2d 599 (1982). For instance, unlike a purely civil matter, indigent parents as well as the child are entitled to court appointed counsel. MCR 5.915(B)(1) and (2). In child protection cases the parents or child's attorney needs to contact the caseworker to prepare for trial and to assist the client to understand and comply with FIA or court requirements. Requiring the lawyer for parents or children in child protective proceedings to obtain the consent of the FIA attorney before contacting the worker would involve the FIA attorney in the day to day case management activities of the caseworker.

Therefore, a lawyer may communicate with a caseworker for the FIA in a case in which the FIA is a petitioner in Family court, notwithstanding an appearance having been filed by an attorney indicating that FIA is represented by counsel.